IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GARY C. SYVY, and SANDRA G. SYVY,	)	
Plaintiffs,	)	
v.	)	C.A. No. 02C-02-060 WCC
LANDMARK ENGINEERING, INC., MUMFORD AND MILLER CONCRETE, INC., GREGGO FERRARA, INC., DELAWARE TURNPIKE ADMINISTRATION, DELAWARE TRANSIT CORPORATION, DELAWARE TRANSPORTATION AUTHORITY and DEPARTMENT OF TRANSPORTATION, STATE OF DELAWARE,	)	NON-ARBITRATION CASE TRIAL BY JURY DEMANDED
Defendants.	)	

Submitted: October 18, 2004
Decided: March 31, 2005

MEMORANDUM OPINION

Upon Defendant Landmark Engineering, Inc.,
Motions for Summary Judgment. Denied.

Joseph J. Rhoades, Esquire; A. Dale Bowers, Esquire; 1225 King Street, 12th Floor, Wilmington, Delaware. Attorneys for Plaintiffs.

Paul Cottrell, Esquire; Victoria K. Petrone, Esquire; First Federal Plaza, Suite 500, P.O. Box 1031, Wilmington, Delaware. Attorneys for Defendant Landmark Engineering, Inc.

CARPENTER, J.

The Court, in an opinion issued on September 28, 2004, granted the State of Delaware's Motion to Dismiss in the above-captioned matter. This has left outstanding Landmark Engineering's two summary judgment motions to which the Court requested additional submissions relating to the interplay between the oversight provided by Delaware Department of Transportation (DelDOT) and Landmark's independent responsibility for the redesign of the Mount Lebanon Road and Rockland Road intersection. After further consideration, the Court finds that factual disputes remain which must be decided by a jury and therefore summary judgment is inappropriate.[1]

Landmark initially filed its Motion for Summary Judgment on November 6, 2002. However, at the request of the parties, the Court stayed consideration of the motion to allow additional discovery to occur. In 2004, a Revised Motion for Summary Judgment was filed by Landmark which was followed by briefing and oral argument.

In the first motion, Landmark argued that based on principles of landlord liability, it did not owe a duty to Plaintiffs as Landmark did not have "actual control" of the property in question. In response, Syvy countered that issues of "active" versus

[1] The facts summarizing the accident and the contractual obligation of the parties were set forth in the Court's Order of September 28, 2004 and will not be repeated in this Opinion.

"passive" control pertain to the duty of the landowner or the landowner's general contractor and Landmark did not play either of those roles with respect to the property in question. Syvy asserts that Landmark's liability is premised on traditional negligence principles embodied in the Restatement (Second) of Torts, § 324A.[2] As such, the Plaintiffs argue Landmark is subject to liability for physical harm, resulting from its failure to exercise reasonable care to protect Syvy for the following reasons: (a) Landmark's failure to exercise reasonable care increased the risk of physical harm; and (b) Landmark performed a duty owed by the State to Syvy; and (c) the harm suffered by Syvy resulted because of the reliance by Syvy upon Landmark's performance.[3]

In Landmark's Revised Motion for Summary Judgment, it asserts that it is entitled to immunity since it was simply fulfilling the State's pre-determined

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[2] Section 324A provides,

> [o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third-person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect this undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT(SECOND) OF TORTS, § 324A (1965).

[3] *See* Pls.' Answering Br. In Opp'n to Def. Landmark's Motions for Summ. J. at 18.

specifications as set forth in the contract. In addition, since the State exercised an extraordinary amount of oversight over Landmark's work, Landmark claims that within the context of this project, it can be classified as a State agent or employee entitled to the protections afforded by the State Tort Claims Act.[4]

The Court first rejects the premise that Landmark Engineering, by the role it played in the design and oversight of this project, has in essence become an employee of the State of Delaware and is thus entitled to the protection found in the State Tort Claims Act.[5] First, the statute is very specific and applies only to a "public officer or employee." There is no reference to immunity for individual entities performing traditional governmental functions through independent contractual relationships and

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[4] See DEL. CODE ANN. tit. 10, § 4001 (2004). Section 4001 provides, in pertinent part,

> no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall be awarded or assessed against the State of any public officer or employee . . . where the following elements are present:
> (1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;
> (2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and
> (3) The act or omission complained of was done without gross or wanton negligence . . . .

[5] 10 *Del. C.* § 4001.

there is absolutely nothing to suggest the General Assembly ever intended to extend this immunity beyond the limited classification of state employees or those serving on government boards. This is not only logical but practical since to interpret otherwise would open the door to allow every independent entity, who performs some work for a government agency, to claim that it is somehow encompassed within this statute and the immunities that flow from it. Not only would it be extremely difficult to determine when this imaginary line between independent contractor and employee has been crossed but it would clearly act as a deterrent to the fair and just compensation for individuals harmed by the negligent conduct of contractors whose only governmental connection is a contractual one. The Court simply cannot believe the General Assembly would ever have intended such a result and this is further evidenced by the limitation on the definition of employee found in 10 *Del. C.* § 4010 which, in pertinent part, states "[t]he term 'employee' shall not mean a person or other legal entity acting in the capacity of an independent contractor under contract to the governmental entity." The Court finds that Landmark's argument that it is entitled to protection under the State Tort Claims Act to be without merit.

The Court also rejects the argument that DelDOT's control over the actions and decisions of Landmark provides a basis to find Landmark's conduct is immunized by the State Tort Claims Act. The interaction between DelDOT and Landmark is an

important factor that the jury will be required to consider in deciding whether Landmark failed to meet the standard of care expected of engineering firms in the particular areas in which it contracted to perform. To what extent Landmark's discretion was limited by DelDOT; Landmark's advice was ignored by DelDOT; or DelDOT limited Landmark's responsibility only to particular aspects of the design and construction project, will all be critical factors for the jury's consideration in making its decision regarding Landmark's negligence. However, the Court cannot allow a company that has been contracted to perform engineering duties by the government to hide behind the alleged "approval" of government employees. As a professional organization, Landmark has full knowledge of the engineering and safety standards applicable to its industry and may not violate those standards without being held accountable.

The Court is doubtful, however, that the standards are as black and white as the Plaintiffs allege. Therefore, reasonable professional discretion and choice of logical practical alternatives are appropriate so long as the general standard of care continues to be met. In addition, the Court is confident that the unique factual interplay between DelDOT and Landmark will be applicable to nearly every aspect of this contract and disparities regarding responsibility, obligations and decisions will simply be issues that the jury will need to decide.

The Court further finds the Defendant's attempt to correlate the facts of this case with the concepts found by this judge in *Irish Hunt Farms , Inc. v. Stafford*[6] to be the ultimate attempt to stretch the facts of one's case. In *Irish Hunt Farms* there truly was a dispute as to the informal relationship between the plaintiff and the stable hand who gave lessons, which mandated a thorough review of the employment relationship. Here, there is no such dispute. Landmark has a formal contractual relationship and would never, outside of this litigation, consider itself an employee of the State.

The other authorities cited by the Defendant in support of its positions also are not applicable to the facts of this case. Those cases involve the immunization of private firms that are simply carrying out the orders and specifications of a governmental agency. If those were the facts here, it would make no sense for the State of Delaware to have hired Landmark in the first place since the type of consulting services provided would be irrelevant and of no value. If the facts presented at trial support the Defendant's theory that it provided no advice or guidance on the engineering of this project, but was merely following the ill conceived directions of a state agency, it is free to make a motion for a directed verdict at the close of the Plaintiff's case. However, at the moment there is nothing to suggest or support such a conclusion. Again, this appears to be a case of the

[6] 2000 WL 972656 (Del. Super.).

Defendant trying to fit the round peg of his contract into a square hole of governmental immunity and it does not fit.

The final argument for summary judgment advanced by the Defendant and asserted in his initial motion for summary judgment is that the roadway, on which the accident occurred is in the care, management and control of DelDOT,[7] and as a result, Landmark owes no duty to the Plaintiffs and thus cannot be held responsible for any injuries that may have occurred. The Defendant's theory is based upon the concept of landlord liability in which control of the property is critical. Defendant argues that because its engineering services have been performed and accepted by the State and it has retained no ownership interest in the roadway, Plaintiffs must look to the State for compensation.

However, the Plaintiffs have responded that they are asserting liability not under a control or ownership theory but based upon negligence principals embodied in the Restatement of Torts § 324A. In other words, the negligence claim is based upon and limited to the alleged failure of Landmark to provide engineering services in violation of engineering industry standards. The Court finds this remains a valid and independent theory of liability, irrespective of the ownership/control theory advanced by the Defendant. Since there appear to be significant factual disputes

[7] 17 *Del. C.* § 131(a)

whether the professional engineering standards have been violated, summary judgment is inappropriate.

While the Court has found summary judgment is not warranted, it feels it is important, in order to avoid other problems at trial, to emphasize that the Plaintiffs will be required at trial to establish that recognized industry standards for this type of engineering work have been violated. General opinions, by an expert that he would have operated in a different manner or propounding general violations, will not be sufficient. Nor will the fact that alternatives were available but not considered be sufficient, unless the failure to consider such alternatives also violates recognized industry standards. In other words, the Plaintiffs must be prepared to establish to the jury what the industry standards are and how they have been violated. The Court recognizes this was a tragic accident that caused harm to the Plaintiffs and it will be easy for counsel to look beyond the establishment of the negligence claim and concentrate their energy on the issue of damages. However, the issue of damages will never be reached unless the jury determines that Landmark is responsible for the harm based on its liability in failing to meet the requisite professional standards.

For the foregoing reasons, Landmark's Motions for Summary Judgment are hereby DENIED. To move the litigation forward, the Court has also today issued a scheduling order for trial beginning on November 28, 2005.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.